90-393 (1)

No. _____

In The

Supreme Court of the United States

October Term, 1990

THE CITY OF DeSOTO, TEXAS, *et al.*,

Petitioners,

v.

DOUGLAS MORGAN, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Upon reviewing *de novo* a law enforcement officer's entitlement to qualified immunity under § 1983, may a federal court of appeals disregard the Supreme Court precedent established by *Harlow v. Fitzgerald*[1] and *Anderson v. Creighton*,[2] which requires that a court examine not only the applicable law at the time of the event in question, but also whether that law was clearly established?

2. To be entitled to qualified immunity in a § 1983 warrantless false arrest case, must a law enforcement officer demonstrate that the existence of actual probable cause, rather than "arguable" probable cause, was necessary for the arrest to have been objectively reasonable?

[Note: Petitioners reserve the right to present argument regarding Question No. 3 in the event certiorari is granted on either or both of the above questions, but do not include Question No. 3 among the reasons for the grant of certiorari.]

3. Is a municipality entitled to dismissal of an action brought against it under § 1983 where it is determined that its law enforcement officers are qualifiedly immune because the law governing their actions was not clearly established at the time of the event in question?

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[1] 457 U.S. 800 (1982).

[2] 483 U.S. 635 (1987).

LIST OF PARTIES

1. The ten Petitioners herein, Defendants-Appellees below, are the City of DeSoto, Texas, Kenneth Hood, Stanley Joe O'Briant, Norman Agee, Dennis Kruse, J. T. Henrise, Earl D. Musser, J. Zihlman, W. Ransom and Boyd Norton.

2. The six Respondents herein, Plaintiffs-Appellants below, are Douglas Morgan, Kerry Curby, Troy Hall, Lisa Blair Bishop, Kathy Kuehler and Jeffrey Scott Escue.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioners respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered on May 10, 1990.

OPINIONS BELOW

The opinion of the Court of Appeals for the Fifth Circuit is reported at 900 F.2d 811 (1990), and is reprinted herein at App. 1. The judgment of the Court of Appeals was rendered and entered on May 10, 1990, and is reprinted herein at App. 2.

The May 3, 1989, opinion and judgment of the United States District Court for the Northern District of Texas (Fish, J.) have not been reported. They are reprinted herein at App. 14 and App. 20, respectively.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on May 10, 1990. No petition for rehearing was sought. On July 30, 1990, Justice Byron R. White ordered that the time for filing this petition for writ of certiorari be extended to and including August 31, 1990. The jurisdiction of this Court to review the judgment of the Fifth Circuit is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

42 U.S.C. § 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of

Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Tex. Penal Code Ann. § 30.05 (Vernon 1989).

Criminal Trespass

(a) A person commits an offense if he enters or remains on property or in a building of another without effective consent and he:

(1) had notice that the entry was forbidden; or

(2) received notice to depart but failed to do so.

(b) For purposes of this section:

(1) "entry" means the intrusion of the entire body; and

(2) "notice" means:

(A) oral or written communication by the owner or someone with apparent authority to act for the owner;

(B) fencing or other enclosure obviously designed to exclude intruders or to contain livestock; or

(C) a sign or signs posted on the property or at the entrance to the building, reasonably likely to come to the attention of the intruders, indicating that entry is forbidden.

STATEMENT OF THE CASE

In the early 1980's, Hampton Road in the City of DeSoto, Texas, became a popular "cruising" spot for teenagers from Tarrant, Dallas and Ellis Counties on weekend and summer nights. On those occasions, hundreds to thousands of vehicles were driven up and down Hampton Road and several hundred young people congregated in parking lots of businesses adjacent to the road. Following such evenings, the parking lots of the businesses were filled with beer bottles, hamburger wrappers, miscellaneous trash, drug paraphernalia, bodily fluids and excrement. Vandalism of the businesses included littering, broken windows and carvings in wood edifices. Additionally, there were violent encounters in some of the parking lots. On different occasions, a young man was stabbed and a young woman was shot in the parking lots.

The trespassing and littering problems became progressively worse from the summer of 1983 to the spring of 1985. The City of DeSoto police department and public officials received numerous complaints from business owners along Hampton Road regarding the littering and congregating in the parking lots after the close of business.

Prior to the spring of 1985, the City of DeSoto Department of Public Safety, Police Division, made numerous attempts to reduce trespassing and loitering on private business property (parking lots) after the businesses closed. The City and its police officers advised merchants to post no trespassing signs in accordance with the Texas Penal Code; conducted periodic patrols of posted property; issued verbal warnings to persons on

the property after the businesses closed; issued warning citations for criminal trespass; distributed printed notices regarding criminal trespass; gave lectures at the local high school; and submitted news articles to the local newspaper. These methods were not successful in curtailing the criminal trespass or littering problems.

In April of 1985, the City of DeSoto police department determined that strict enforcement of the Texas Penal Code section regarding criminal trespass would be the only legal and effective solution to the problems. One of the police officers, Dennis Kruse, developed a plan to effect the arrests of persons whom the police officers had probable cause to believe were violating § 30.05(a) of the Texas Penal Code. Pursuant to that plan, persons congregating in the parking lots which were posted with no trespassing signs were to be arrested after 10:00 p.m.

Plaintiffs, Respondents herein, were arrested either at the Pleasant Run Village Shopping Center or the Hampton Square Shopping Center parking lots after 10:00 p.m. on May 3, 1985, by police officers who were acting under color of state law, in their official capacities as City of DeSoto police officers at the time of the arrests. When the police officers arrived at the shopping centers, the businesses were closed and the parking lots were posted with no trespassing signs which the police officers believed to be reasonably likely to come to the attention of the intruders. Thus, the police officers believed that probable cause existed to arrest the individuals on the posted private property for criminal trespass.

The Pleasant Run Village Shopping Center had five no trespassing signs posted on light standards in the

parking lot and on the fascia of the building. The signs were posted ten to twelve feet above the ground and the parking lot was well lit at night. The signs were white with red print and stated as follows:

> No trespassing. These premises are for Pleasant Run Village Shopping Center customers and tenants only. Entry to the lot by all other persons is prohibited. Violators will be prosecuted under Section 30.05 of the Texas Penal Code.

Similarly, the Hampton Square Shopping Center was posted with eight no trespassing signs. The 12-inch by 18-inch signs at the Hampton Square Shopping Center read as follows:

> No trespassing. These premises are for Hampton Square Shopping Center patrons only. Loitering and littering are prohibited by law and will be prosecuted under Section 30.05 of the Texas Penal Code.

Plaintiffs were arrested for violation of § 30.05 of the Texas Penal Code. Thereafter, each Plaintiff was indicted by a Dallas County grand jury for criminal trespass. Plaintiffs Blair and Kuehler were found not guilty after a jury trial and the indictments against the remaining Plaintiffs subsequently were dismissed.

Plaintiffs filed their Original Complaint on April 24, 1987, alleging that they had been deprived of their constitutional rights as the result of their arrests for criminal trespass on May 3, 1985. On January 11, 1989, the district court entered an order granting summary judgment in favor of David Farmer, Mark Wedding, Henry S. Miller Company and C. W. Rowlett as property managers of the two shopping centers. On May 3, 1989, the district court

entered a memorandum order dismissing Plaintiffs' claims against the City of DeSoto and the police officers.

On May 10, 1990, the Court of Appeals for the Fifth Circuit reversed the district court in part, holding that a genuine issue of material fact existed, precluding summary judgment for the police officers for the allegedly unlawful trespassing arrests, as to whether the no trespassing signs posted on the two shopping center parking lots were reasonably likely to come to the attention of Plaintiffs. The court of appeals further held that a genuine issue of material fact also existed, precluding summary judgment for the City of DeSoto, as to whether the city council, the chief of police and the director of public safety, acting as municipal policymakers, were responsible for the allegedly unlawful arrests, if they were unlawful. The remainder of the district court's decision was affirmed, and that part of the cause of action for which the decision was reversed was remanded to the lower court.

REASONS FOR GRANTING THE WRIT

I.

Upon reviewing *de novo* a law enforcement officer's entitlement to qualified immunity under § 1983, the court of appeals was not entitled to disregard established Supreme Court precedent by failing to examine whether the applicable law was clearly established at the time of the event in question.

This Court has held that government officials performing discretionary functions generally are entitled to qualified immunity from suit and damages where "their

conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982); *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985). The critical issue is not whether a defendant actually infringed upon a plaintiff's rights: "Even defendants who violate constitutional rights enjoy a qualified immunity that protects them from liability for damages unless it is further demonstrated that their conduct was unreasonable under the applicable standard." *Davis v. Scherer*, 468 U.S. 183, 190 (1984). To aid in that determination, this Court has reaffirmed that "whether an official protected by qualified immunity may be held personally liable for an allegedly unlawful action turns on the 'objective legal reasonableness' of the action . . . assessed in light of the legal rules that were 'clearly established' at the time it was taken." *Anderson v. Creighton*, 483 U.S. 635, 639 (1987) (citations omitted). For the relevant legal standards to be "clearly established," the "contours" of the right alleged to have been violated "must be sufficiently clear that a reasonable official would understand that what he is doing violates that right," that is, "in light of preexisting law the unlawfulness must be apparent." *Id.* at 640. Several guidelines have emerged from case law to assist a court in its inquiry into when a right is clearly established.

> First, the particular right under consideration must be defined with reasonable specificity. Next, the court must decide whether the decisional law of the Supreme Court or the appropriate circuit court has clearly established the right in question. The ultimate inquiry is whether in light of preexisting law the unlawfulness of the defendant official's actions is apparent.

Francis v. Coughlin, 891 F.2d 43, 46 (2d Cir. 1989), *citing Anderson v. Creighton*. Within a summary judgment context, if a plaintiff fails to sustain the burden of showing how the defendant violated a clearly established right, the defendant need not demonstrate that no material facts remain in dispute to prevail on the motion. *Hannula v. City of Lakewood*, 907 F.2d 129, 131-32 (10th Cir. 1990).

Thus, where an action is taken by a law enforcement officer and the requisite probable cause to take such action is absent or cannot be conclusively established as a matter of law, the relevant question becomes "the objective (albeit fact-specific) question whether a reasonable officer could have believed [the action taken] to be lawful, in light of clearly established law and the information the [officer] possessed." *Anderson*, 483 U.S. at 641. *See also Bigford v. Taylor*, 896 F.2d 972, 974 (5th Cir. 1990). If this question is affirmatively answered upon consideration of a motion for summary judgment, the motion should be granted without placing the burden upon the movant to establish the absence of any genuine issue of material facts. *Hannula*, 907 F.2d at 131-32.

The decision of the Court of Appeals for the Fifth Circuit is wrong and creates an unjust, far-reaching result because it impermissibly disregards whether the decisional law of the circuit had clearly established the right in question when Plaintiffs' arrests occurred in 1985. This omission of substantive scrutiny directly contravenes the legal precedent established by the Supreme

Court, which has been followed by the other federal courts of appeals and other panels of the Fifth Circuit.*

In the instant case, the court of appeals offers a cursory discussion of qualified immunity, then couches the relevant question of entitlement in terms of whether a reasonable officer could have concluded that Plaintiffs had committed the crime of criminal trespass. *Morgan v. City of DeSoto*, 900 F.2d 811, 814 (5th Cir. 1990), App. 7-8, *infra*. According to the court, this depends upon whether the no trespassing signs posted on the property indicated that entry was forbidden and were reasonably likely to come to the attention of an intruder. *Id.* at 814, App. 8, *infra*. The court notes that it was not necessary that the signs be seen by an intruder or that they be visible from any particular place. *Id.* Nevertheless, the court concludes that despite the "sizeable summary judgment record" before it, *id.* at 814, App. 5, *infra*, "a fact finder could find that a reasonable officer would necessarily believe that no probable cause existed to arrest someone on [the parking] lots without a warning and order to leave." *Id.* at 815, App. 8-9, *infra*.

In its opinion, the court accurately cites *Bain v. State*, 677 S.W.2d 51 (Tex.Crim.App. 1984), *overruled on other*

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* *See, e.g., Anderson, supra; Hannula*, 907 F.2d at 131-32; *Amsden v. Moran*, 904 F.2d 748, 751-58 (1st Cir. 1990); *Auriemma v. Rice*, 895 F.2d 338, 343-45 (7th Cir. 1990); *Powell v. Mikulecky*, 891 F.2d 1454, 1456-63 (10th Cir. 1989); *Francis*, 891 F.2d at 45-46; *Eugene D. By and Through Olivia D. v. Karman*, 889 F.2d 701, 705-11 (6th Cir. 1989); *Crowder v. Sinyard*, 884 F.2d 804, 822-23 (5th Cir. 1989), *cert. denied*, ___ U.S. ___, 110 S.Ct. 2617 (1990); *Hodorowski v. Ray*, 844 F.2d 1210, 1216-18 (5th Cir. 1988).

grounds, Black v. State, 739 S.W.2d 240 (Tex.Crim.App. 1987), as the Circuit's only published authority in 1985 which had interpreted the notice provision of Section 30.05 of the Texas Penal Code, the criminal trespass statute. *Morgan*, 900 F.2d at 814, App. 8, *infra*. The court, however, wholly fails to address whether the right at issue was clearly established at the time of the arrests in question before finding the existence of a material fact issue. *Id.* at 814-15, App. 7, *infra*. The significance of the *Bain* holding to the instant case, apparently ignored by the court, was that probable cause existed to arrest a suspect for criminal trespass where a no trespassing sign, located approximately 100 feet from the train on which the suspect was arrested, was not visible to the suspect *and the suspect had not been asked or ordered to leave the property*. *See Bain*, 677 S.W.2d at 57-58. The state court there held that the presence of the no trespassing sign gave the constable probable cause to arrest, and that the lack of the sign's visibility was "irrelevant since the statute only requires a reasonable likelihood that the sign be visible to intruders." *Id.*

An examination of the clearly established law of the circuit in 1985 therefore would have revealed that a warning or order to leave the premises at issue was not required to establish probable cause for criminal trespass where those premises were posted with at least one no trespassing sign. By merely citing *Bain*, however, and failing to expressly address what applicable law was clearly established in the Fifth Circuit, the court of appeals erroneously decided that a disputed issue of fact precluded the granting of qualified immunity to the arresting officers. *Morgan*, 900 F.2d at 814-16. App. 7-9,

infra. Under the correct analysis, the granting of the motion for summary judgment on behalf of the officers should have been affirmed because, based on the competent summary judgment evidence before the district court and the court of appeals, a warning or order to leave was not necessary to establish the existence of probable cause to arrest an individual for criminal trespass. Due to this fact, the alleged unlawfulness of the police officers' actions could not have been apparent based upon the information the officers possessed at the time of the arrests. *See Anderson, supra*. The officers therefore were entitled to summary judgment as a matter of law based upon qualified immunity.

It is important that this Court remedy the injustice visited upon the arresting officers who were denied qualified immunity in the court below. If other courts follow the *Morgan* panel's example of failing to address the issue of clearly established law in deciding a motion for summary judgment premised on qualified immunity, many meritorious motions will be improvidently denied due to an unnecessary determination that a material fact issue may exist. Governmental officials sued under § 1983 will lose their right not to stand trial or face the burdens of litigation if their case is erroneously permitted to go to trial, *see Mitchell*, 472 U.S. at 526, and both the societal and litigation costs will be great. Officials will be distracted from their governmental responsibilities, their discretionary decisionmaking abilities will be inhibited, able people will be deterred from public service, and governmental operations generally will be disrupted by the discovery and litigation processes. This Court's consideration of this issue is essential to all governmental

entities, and those persons employed by them, throughout the country.

II.

The Fifth Circuit has created an apparent conflict with other circuit courts in § 1983 warrantless false arrest cases by requiring a law enforcement officer claiming qualified immunity to demonstrate that the existence of actual probable cause, rather than "arguable" probable cause, was necessary for the arrests in question to have been objectively reasonable.

The decision of the court of appeals merits reversal because it is in apparent conflict with the decisions of at least three other circuits in that it unjustifiably imposes a more burdensome qualified immunity standard upon a police officer in warrantless false arrest cases. In *Morgan*, the court of appeals in essence ruled that for the officers to be qualifiedly immune, the existence of actual probable cause was necessary for Plaintiffs' arrests to have been objectively reasonable. *Morgan*, 900 F.2d at 814-15, App. 8-9, *infra*. Other circuits, however, have held that "[i]n determining whether qualified immunity exists, the issue is 'not probable cause in fact but 'arguable' probable cause.' " *Von Stein v. Brescher*, 904 F.2d 572, 579 (11th Cir. 1990). *See also Gorra v. Hanson*, 880 F.2d 95, 97 (8th Cir. 1989) (*quoting Floyd v. Farrell*, 765 F.2d 1, 5 (1st Cir. 1985)). Consistent with this approach, "a police officer should not be found liable under § 1983 for a warrantless arrest because the presence of probable cause was merely questionable at the time of the arrest. His qualified immunity is pierced only if there clearly was no probable cause at the time the arrest was made." *Floyd*, 765 F.2d at 5.

Morgan effectively holds that if probable cause is arguable, then the district court is precluded from finding as a matter of law that an officer is entitled to qualified immunity. Under the test employed by the First, Eighth and Eleventh Circuits, however, the relevant question is whether a "[r]easonable law enforcement officer[ ], possessing the same knowledge and in the same circumstances as [the arresting officer], could have believed that 'arguable' probable cause existed for [the] arrest." *Von Stein*, 904 F.2d at 580. This is a decisively less burdensome standard which, if utilized by the Fifth Circuit in the instant case, would have mandated a different result, particularly in light of the meager body of case law interpreting the Texas criminal trespass statute in 1985. *See, e.g., Gorra*, 880 F.2d at 98. Certainly in this instance, the arresting officers had arguable probable cause to arrest Plaintiffs for criminal trespass in light of the preexisting law of the Fifth Circuit, and based upon the competent summary judgment evidence, they were entitled to qualified immunity as a matter of law for their actions.

The dichotomy which presently exists between the standards of the Fifth Circuit Court of Appeals and the First, Eighth and Eleventh Circuit Courts of Appeals should be resolved by this Court approving the "arguable" probable cause standard in warrantless false arrest cases. Qualified immunity protects law enforcement officers in cases where they "reasonably but mistakenly conclude that probable cause is present. . . . " *Anderson*, 483 U.S. at 641. Actual probable cause therefore is not necessary for an arrest to be objectively reasonable, and the "arguable" probable cause standard would ensure, consistent with this Court's established precedent, that "all

public officials are protected except the 'plainly incompetent' and those who are deemed to have 'knowingly violate[d] the law.' " *Gorra*, 880 F.2d at 97 (*quoting Malley v. Briggs*, 475 U.S. 335, 341 (1986)).

CONCLUSION

It is respectfully submitted that, for the reasons presented above, this petition for writ of certiorari should be granted.

Respectfully submitted,

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INDEX TO APPENDIX

Douglas MORGAN, et al.,
Plaintiffs-Appellants,

v.

The CITY OF DeSOTO, TEXAS, et al.,
Defendants-Appellees.

No. 89-1727.

United States Court of Appeals,
Fifth Circuit.

May 10, 1990.

Arrestees brought a § 1983 action against city, police officers, and shopping center managers, claiming their arrests in the shopping center's parking lot were illegal. The United States District Court for the Northern District of Texas, A. Joe Fish, J., rendered summary judgment for all defendants, and plaintiffs appealed. The Court of Appeals, Reavley, Circuit Judge, held that: (1) genuine issue of material fact existed, precluding summary judgment for the arresting officers, as to whether signs posted on the property indicating that entry was forbidden were reasonably likely to come to the attention of intruders; (2) genuine issue of material fact existed as to whether city officials were responsible for illegal arrest, if they were illegal; and (3) there was nothing to suggest that shopping center managers had any role in, or even notice of, the official decision to make the arrests.

Affirmed in part, reversed in part, and remanded.

Douglas R. Larson, Mesquite, Tex., for Douglas Morgan, et al.

Kent S. Hofmeister, Jerry C. Gilmore, D. Bradley Dickinson, Vial, Hamilton, Koch & Knox, Dallas, Tex., for

DeSoto, Tex., Hood, O'Briant, Agee, Krude, Henrise, Broadnax, Musser, Zuhlman, Ransom, Norton & Dyer.

David B. Dyer, Louis J. Weber, Jr., Jenkins & Gilchrist, Dallas, Tex., for Farmer & Wedding.

Garland F. Henley, Law Offices of Garland F. Henley, Dallas, Tex., for Rowlett.

Judith H. Winston, R. Brent Cooper, Cowles & Thompson, Dallas, Tex., for Henry S. Miller Co.

Appeal from the United States District Court for the Northern District of Texas.

Before GOLDBERG, REAVLEY and HIGGINBOTHAM, Circuit Judges.

REAVLEY, Circuit Judge:

There was trouble in the City of DeSoto in the years 1983 to 1985. Young people "cruised" the main street at night and congregated in large numbers in adjacent parking lots. Shopping centers were hardest hit. In addition to the traffic jams and some vandalism, the biggest trouble was the litter which had to be cleaned from the lots the following mornings. Evictions and warnings by the police, as well as distribution of leaflets and speeches about the trespass law, had little success. Trouble in DeSoto did not end. And as the complaints of the citizens and shopping center managers continued, city officials resolved to act. And act they did.

At 10 p.m. on the night of May 3, 1985, the police force augmented by constables and sheriff's deputies from Dallas County descended on the parking lots and arrested every person who happened to tread that

ground that evening. Juveniles were detained in handcuffs only until they could be taken to the local police station, but the culprits who were 17 or older received the full treatment of the criminal justice system: jail and prosecution for criminal trespass. No doubt some of the arrestees had received prior warnings and deserved little sympathy for what happened to them that evening. The same cannot be said for everyone. Take, for example, the girls on the Grand Prairie softball team.

Four high schools girls on the Grand Prairie team had come to DeSoto to play in a softball tournament that evening. After the game, wearing their uniforms, they were on their way home when the driver made the fatal mistake of pulling off the street onto the edge of a parking lot to investigate signals from boys in a following pickup truck. Their meeting lasted two minutes before all were arrested, handcuffed with hands behind their backs, and put in a circle on the pavement until a police paddy wagon transported them to the city police station. These girls had no previous experience of this nature, no knowledge of any wrong of which they were guilty, and they cooperated at all times with the police and authorities. Nevertheless they were marched before a municipal judge who issued a capias for the benefit of the Dallas County Sheriff. Deputies then transported the girls to the Dallas County jail, where they were processed again and placed in a jail tank with prostitutes and a screaming prisoner. A telephone call to their parents was finally allowed between 1:00 and 2:30 in the morning. The girls spent the night in the jail. Some of the boys did not obtain release until late the next afternoon.

It did not stop there. The charges were taken up by the Criminal District Attorney of Dallas County. To prove how resolute that office is against the forces of crime, these girls were indicted by the Dallas County grand jury and prosecuted vigorously in criminal court. When matters finally reached the hands of sensible people, the jurors, the girls were acquitted. After three trials ended in acquittals, the remaining indictments were dismissed.

The crime which these girls were supposed to have committed takes us to section 30.05 of the Texas Penal Code, which at the time of their arrest provided as follows:

§ 30.05 Criminal Trespass

(a) A person commits an offense if he enters or remains on property or in a building of another without effective consent and he:

(1) had notice that the entry was forbidden; or

(2) received notice to depart but failed to do so.

(b) For purposes of this section:

(1) "entry" means the intrusion of the entire body; and

(2) "notice" means:

(A) oral or written communication by the owner or someone with apparent authority to act for the owner;

(B) fencing or other enclosure obviously designed to exclude intruders or to contain livestock; or

(C) a sign or signs posted on the property or at the entrance to the building,

> reasonably likely to come to the attention of the intruders, indicating that entry is forbidden.

Tex.Penal Code Ann. § 30.05 (Vernon 1989) (amended 1989).

The plaintiffs were arrested either at the Pleasant Run Village Shopping Center or the Hampton Square Shopping Center. Signs 12 to 18 inches square were affixed on light standards at a height of 10 or 20 feet. Most of them were facing in toward the parking areas and not the outer boundaries. The eight signs posted at Hampton Square Shopping Center read as follows:

> No trespassing, these premises are for Hampton Square Shopping Center patrons only. Loitering and littering are prohibited by law and will be prosecuted under § 30.05 of the Texas Penal Code.

The five signs posted at Pleasant Run Village Shopping Center read as follows:

> No Trespassing, these premises are for Pleasant Run Shopping Center customers and Tenants only. Entry to the lot by all other persons is prohibited. Violators will be prosecuted under 30.05 of the Texas Penal Code.

The visibility of these signs at night was controverted. The DeSoto police officers said that they were visible and readable. Plaintiffs said that they could not read the signs even when the location was pointed out to them.

In this sizeable summary judgment record, with five volumes of court papers, six depositions, and four volumes of transcripts of three trials in the Dallas County

criminal court, and in the briefs and arguments of counsel before this court, there is no suggestion from any defendant or defendant's lawyer that there was the least impropriety in the entire May 3, 1985 operation, or that the consequences were at all regrettable. One affiant states that the mayor of DeSoto opined that "if some kids had to go to jail, it was too bad, but maybe it would teach others not to go on the parking lots in DeSoto." The defendants presented an affidavit of Dr. Merlyn D. Moore, as an expert "in the analysis of police operations." Dr. Moore concludes his affidavit with this statement: "In my opinion, there was a valid justification for the prior planning, the arrest and the following detention."

This court is unable to understand that opinion or to find any justification for the extent of this operation. Regardless of the visibility of the signs, regardless of whether a class B misdemeanor (criminal trespass) was committed, regardless of whether the officers had a probable cause to arrest, and regardless of how bad a litter problem the shopping centers were having, we can find no explanation for taking every high school student found on the parking lot under any circumstances and arresting them, handcuffing them, and keeping them in jail for the night as if they were threats to society. Whatever the legal points and the liability, how can any party deny that the criminal justice system operated here as an instrument of oppression?

This Case

Having said that,[1] we come to the case before us. Seven of the young people arrested brought this civil rights action under 42 U.S.C. § 1983, seeking damages for the unconstitutional deprivation of their liberty because of an illegal arrest. They sued the arresting officers, the City of DeSoto, and the managers of the two shopping centers. Summary judgment was rendered for all defendants. We reverse the judgment for the officers and the City.

1. *Arresting Officers*

The plaintiffs could establish a cause of action by proving that the officers had no probable cause to arrest them. However, even if probable cause did not in fact exist, the law enforcement officials were entitled to qualified immunity if a reasonable officer could have believed the arrest to have been lawful, in light of clearly established law and the information the arresting officers possessed. *Anderson v. Creighton*, 483 U.S. 635, 643, 107 S.Ct. 3034, 3040, 97 L.Ed.2d 523 (1987). An arresting officer is not liable unless a reasonable officer would understand that what he is doing violates a right of the citizen being arrested. The unlawfulness must be apparent. 107 S.Ct. at

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[1] Our introduction is not entirely irrelevant to the lawsuit at hand. The DeSoto operation, and its scope, were apparently planned by top city officials. The planning and the follow up tend to prove that arrests of innocent high school girls, with or without probable cause, may have been considered an acceptable risk of the plan. Or that the planners were indifferent to that likely consequence.

3039. The arresting officers here were therefore entitled to summary judgment if the summary judgment proof left no issue but that a reasonable officer could have thought that the plaintiffs had committed the crime of criminal trespass. That, in turn, depended upon whether the signs posted on the property indicated that entry was forbidden and were reasonably likely to come to the attention of intruders. It was not necessary that the sign be seen by the arrestee or that it be visible to them from any particular place. It was only required that there be a reasonable likelihood that a sign would "come to [their] attention." Texas Penal Code Ann. § 30.05(b)(2)(C) (Vernon 1989); *Bain v. State*, 677 S.W.2d 51, 58 (Tex.Crim.App. 1984) *overruled on other grounds, Black v. State*, 739 S.W.2d 240 (Tex.Crim.App.1987).

Whether a reasonable officer could have concluded that there was a reasonable likelihood that these signs, or one of them, would come to the attention of an intruder, is a question of fact. We are unable to resolve this question on the summary judgment record before us. Aside from the question of whether, under all of these circumstances, the signs would give reasonable notice to anyone driving upon or across the shopping center parking lot that they were excluded from doing so, the visibility of the signs and their messages cannot be determined. We find references to photographs and drawings, but none of them was included in the record. Several of the plaintiffs testified at the criminal trials that they were unaware of the signs and could not read them after they were directed by the officers where to look. From the statements in this record we conclude that a fact finder could find that a reasonable peace officer would necessarily

believe that no probable cause existed to arrest someone on these lots without a warning and order to leave. The fact finder could accept plaintiffs' version of the facts, as follows: The lots were used freely by the public during the day. One of them was also used at night to obtain access to a drive-through food outlet. Of the many entrances to the parking areas, a sign was posted at only one entrance. The other signs were not likely to be seen unless one went into the parking area and looked for them. At night they were difficult to read unless one were at the right place. Citizens could easily drive upon the lots without the slightest reason to believe they might be guilty of wrongdoing. And even if they happened to read one of the signs, they would not likely understand that a mere entry was a forbidden act, for which they could be charged with crime.

It follows that the qualified immunity of the arresting officers was not established, and neither was probable cause for the arrests. Summary judgment was improper.

2. *Officers Byers and Brodnax*

What has been said about the other officers does not apply to W.M. Brodnax and L.R. Byers, who were not at these two parking lots on this occasion and had no role in the arrests of any of these plaintiffs. No issue having been raised as to their liability, the summary judgment in their favor stands.

3. *City of DeSoto*

This is not a case where the complaining party predicates her case upon a municipal policy or custom responsible for the injury. But there is an issue here of whether the City Council of DeSoto or its Police Chief or Director of Public Safety, acting as the city policymaker, were responsible for illegal arrests, if they were illegal. If the council or its policymaker directed arrests whether or not the parking lots were legally posted, and irrespective of notice to intruders, or in reckless disregard thereof, the City would be liable for a resulting constitutional deprivation. *See City of St. Louis v. Praprotnik*, 485 U.S. 112, 123, 108 S.Ct. 915, 923-24, 99 L.Ed.2d 107 (1988) (O'Connor, J., plurality); *Pembaur v. City of Cincinnati*, 475 U.S. 469, 480-81, 106 S.Ct. 1292, 1298-99, 89 L.Ed.2d 452 (1986) (Brennan, J., plurality); *Monell v. Department of Social Servs.*, 436 U.S. 658, 694-95, 98 S.Ct. 2018, 2037-38, 56 L.Ed.2d 611 (1978). The statements of the city officials, the minutes of the City Council meeting held on May 6, 1985 and the testimony of the Director of Public Safety and the Police Chief raise substantial questions about that potential liability. We conclude that the summary judgment was premature.

4. *The Shopping Center Managers*

The Henry S. Miller Company and its agents David Farmer and Mark Wedding, as managers of the Pleasant Run Village Shopping Center, and C.W. Rowlett as manager of Hampton Roads Shopping Center, were sued on the theory that they were parties to a conspiracy in the illegal arrests of the plaintiffs. In order to prove their

liability, plaintiffs would have to establish that these defendants were parties to a preconceived plan to arrest the persons on the parking lot because of the plan and without any independent investigation by the officers. *See Sims v. Jefferson Downs Racing Ass'n*, 778 F.2d 1068, 1079 (5th Cir.1985). But there is nothing in this record that suggests that these property managers had any role in, or even notice of, the official decision to arrest the plaintiffs. These defendants requested the assistance of the officials to protect their property, and they supported the charges once made by the proper officials. Summary judgment in their favor was proper.

Conclusion

The judgment of the district court is affirmed dismissing the claims against W.M. Brodnax, L.R. Byers, Henry S. Miller Company, David Farmer, Mark Wedding and C.W. Rowlett; as to the arresting officers defendants Kenneth Hood, Stanley Joe Briant, Norman Agee, Dennis Kruse, J.T. Henrise, Earl D. Musser, J. Zihlman, W. Ransom and Boyd Norton, and the City of DeSoto, the judgment is reversed. The remaining cause of action is remanded to the direct court.

AFFIRMED IN PART, REVERSED IN PART AND REMANDED.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 89-1727

D.C. Docket No. CA 3 87 1092 G

DOUGLAS MORGAN, ET AL.,

Plaintiffs-Appellants,

versus

THE CITY OF DESOTO, TEXAS, ET AL.,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Texas

Before GOLDBERG, REAVLEY and HIGGINBOTHAM, Circuit Judges.

JUDGMENT

(MAY 10, 1990)

This cause came on to be heard on the record on appeal and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the District Court is affirmed dismissing the claims against W. M. Brodnax, L.R. Byers, Henry S. Miller Company, David Farmer, Mark Wedding and C.W. Rowlett; as to the arresting officers defendants Kenneth Hood, Stanley Joe Briant, Norman Agee, Dennis Kurse, J.T. Henrise, Earl D. Musser, J. Zihlam, W. Ransom and Boyd Norton, and the City of DeSoto, the judgment is reversed. The

remaining cause of action is remanded to the District Court.

IT IS FURTHER ORDERED that defendants-appellees pay to plaintiffs-appellants the cost on appeal to be taxed by the Clerk of this Court.

May 10, 1990

ISSUED AS MANDATE: JUN 1 1990

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

DOUGLAS MORGAN, ET AL., Plaintiffs,	)	CIVIL ACTION NO. CA 3-87-1092-G
VS.	)	(Filed May 3, 1989)
THE CITY OF DESOTO, TEXAS, ET AL., Defendants.	)	

MEMORANDUM ORDER

This case is before the court on motion of the City of DeSoto, Texas and of the police defendants (Kenneth Hood, Stanley Joe O'Briant, Norman Agee, Dennis Kruse, J.T. Henrise, W.M. Broadnax, Earl D. Musser, J. Zuhlman, W. Ransom, Boyd Norton, and L.R. Byers) to dismiss, or in the alternative, for summary judgment.

I. Background

This suit arises out of the plaintiffs' arrest on May 3, 1985 for allegedly committing criminal trespass in violation of the Texas Penal Code. Early in 1985, the City of DeSoto police department decided that strict enforcement of this law was the only effective means to reduce trespassing on various Hampton Road private parking lots after business hours.[1] In April, Lieutenant Dennis Kruse developed a plan to arrest those whom the police had probable cause to believe were violating the statute on

[1] The trespassing had resulted in littering and vandalism of the businesses located there.

May 3, 1985. The officers arrived at the Pleasant Run and Hampton Square Shopping Centers after 10:00 p.m.; the businesses had since closed.[2]

Plaintiffs Morgan, Curby, Hall, and Escue were arrested at Pleasant Run. Morgan, Hall, and Curby contend that they were attempting to turn into a Jack-in-the Box by driving along a paved strip through the lot when arrested by defendants Musser, Kruse, and Henrise. Escue also alleges that he was attempting to turn into the Jack-in-the-Box when arrested by defendants Kruse and Ransom. There were five no trespassing signs posted on the lot. Plaintiffs Bishop and Kuehler, on the other hand, were arrested at Hampton Square. They allege that they drove into the lot to determine what some young men following them wanted. They were arrested by defendant Zuhlman in the company of Norton and Kruse. There were eight no trespassing signs on this lot.

Each plaintiff was subsequently indicted for trespass by a Dallas grand jury. Blair and Kuehler were found not guilty, and the indictments against the other plaintiffs were dismissed. In April 1987, the plaintiffs filed this suit, alleging violation of their legal rights.

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[2] The plaintiffs have claimed that they dispute many of these facts. However, they have offered no contradictory set of facts, or opposing evidence, or a factual basis to dispute the credibility of the affidavits from which these facts were drawn.

II. Analysis

A. Police Officers

Qualified immunity shields government officials performing discretionary functions from liability for civil damages if their actions could reasonably have been considered consistent with the rights they are alleged to have violated. The court must assess the objective legal reasonableness of their actions, in light of the legal rules that were clearly established at the time. The contours of the plaintiffs' rights must have been clear enough for a reasonable official to have understood that he was violating those rights. Thus, in light of preexisting law, the unlawfulness of the defendants' acts must have been apparent. Anderson v. Creighton, ___ U.S. ___, 107 S.Ct. 3034, 3038 (1987); Matherne v. Wilson, 851 F.2d 752, 756-57 (5th Cir. 1988); Hodorowski v. Ray, 844 F.2d 1210, 1216 (5th Cir. 1988). The court must measure the "law's certainty" against "an objectively reasonable view of the facts facing an official." *Matherne*, 851 F.2d at 756.

In light of preexisting law and the facts known to the defendant officers, it was not apparent that plaintiffs' arrest for criminal trespass was unlawful. A person commits criminal trespass if he "enters or remains on" property without consent and had notice that entry was forbidden or received notice to depart but failed to do so. Texas Penal Code Ann. § 30.05(a) (Vernon 1989). Notice is defined as "a sign or signs posted on the property or at the entrance to the building, reasonably likely to come to the attention of intruders, indicating that entry is forbidden." § 30.05(b)(2)(C). The statute does not detail the number or size of the signs to be utilized, the size of the sign wording, or where the signs are placed. Aside from

the statute, the other source of pre-existing law is Bain v. State, 677 S.W.2d 51 (Tex. Crim. App. 1984) (en banc), where the Court of Criminal Appeals held that the statute does not require that the sign actually be visible to the person arrested. Rather it "only requires a reasonable likelihood" that the sign be visible. *Id.* at 58.

The plaintiffs were on the lots after 10:00 p.m. The businesses at the shopping center had already closed. The lots were posted with no trespassing signs, as required by the statute. The officers may have been zealous in enforcing the statute, but they could reasonably have concluded that the plaintiffs were in violation of its terms. Thus, any unlawfulness of the arrests would not have been apparent to them.[3]

B. City of DeSoto

Plaintiffs' claims against the City of DeSoto must also be dismissed. To make out a claim against the city under 42 U.S.C. § 1983, the plaintiffs must identify "(1) a policy (2) of the city's policymaker (3) that caused (4) the plaintiffs to be subjected to a deprivation of constitutional right." The policy or custom must be the moving force of the constitutional violation. Palmer v. City of San Antonio, 810 F.2d 514, 516 (5th Cir. 1987). Although the plaintiffs have identified no official written policies

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[3] The defendant officers could not be expected to know the subjective thoughts of the plaintiffs (e.g., plans to turn into a Jack-in-the-Box or to find out what young men wanted). Nor could they refuse to enforce this criminal statute merely because it may have been inartfully drafted or because there was not an abundance of case law interpreting it.

regarding their § 1983 claim, such policies may nevertheless exist in the form of unwritten customs. The custom or policy must actually be that of the city's governing body, not merely that of the police officers, before the city can be held liable. *See* Bennett v. City of Slidell, 728 F.2d 762, 767 (5th Cir. 1984), *cert. denied*, 472 U.S. 1016 (1985). Isolated incidents are not enough; there must be persistent, repeated, and constant violations. *Palmer*, 810 F.2d at 516.

The first policy alleged by plaintiffs is a failure to train the officers. Plaintiffs have not adduced any evidence, however, that the city deliberately chose an inadequate training program. *See* City of Oklahoma City v. Tuttle, ___ U.S. ___, 105 S.Ct. 2477, 2435 (1985); *Palmer*, 810 F.2d at 516. Nor is there evidence of persistent, repeated, and constant violations of constitutional rights by virtue of this alleged failure to train.

The other policies alleged by plaintiffs are: ignoring the trespassing statute's notice requirements; failing to ensure that the DeSoto officers ascertained the sufficient and readily available facts before arresting; preventing the free association of DeSoto citizens; and ratifying the conduct of its officers. There are several flaws in these arguments. First, the plaintiffs have not adduced any evidence to demonstrate that the *city* had a deliberate policy to do these things. Second, the conduct alleged does not rise to the level of persistent, repeated, and constant violations. Third, the "ascertainment of facts" policy is really part of the "failure to train" policy, so that this argument must be rejected for the same reasons. Fourth, the alleged "anti-free association" policy does not state a constitutional claim: citizens of DeSoto remain free

to associate but simply cannot do so in violation of the trespassing statute. Fifth, plaintiffs have not adduced any evidence of ratification, or that it is DeSoto's "custom" or "policy" to ratify its officers' acts.

Therefore, the constitutional claims against the city must be dismissed.

Conclusion

1. The constitutional claims against the officers and city must be DISMISSED.

2. Because the federal law claims have been dismissed, the pendent state law claims are DISMISSED without prejudice to being filed in state court. United Mine Workers v. Gibbs, 383 U.S. 715, 726 (1966).

SO ORDERED.

May 3, 1989.

/s/ A. Joe Fish

A. JOE FISH
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

DOUGLAS MORGAN, ET AL., Plaintiffs,	)	CIVIL ACTION NO. CA 3-87-1092-G
VS.	)	(Filed May 3, 1989)
THE CITY OF DeSOTO, TEXAS, ET AL., Defendants.	)	

JUDGMENT

For the reasons stated in the memorandum orders of January 11, 1989 and May 3, 1989, it is **ORDERED** that plaintiffs take nothing from defendants and that defendants recover their costs of court.

May 3, 1989.

/s/ A. Joe Fish
A. JOE FISH
United States District Judge

(2)

No. 90-393

In The

Supreme Court of the United States

October Term, 1990

THE CITY OF DeSOTO, TEXAS, et al.,

Petitioners,

v.

DOUGLAS MORGAN, et al.,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

Petitioners claim the following issues should be considered by the Supreme Court. It is the Respondent's position that none of them merit review by the Supreme Court.

1. Upon reviewing *de novo* a law enforcement officer's entitlement to qualified immunity under § 1983, may a federal court of appeals disregard the Supreme Court precedent established by *Harlow v. Fitzgerald*, 457 U.S. 800 (1982) and *Anderson v. Creighton*, 483 U.S. 635 (1987), which requires that a court examine not only the applicable law at the time of the event in question, but also whether that law was clearly established?

2. To be entitled to qualified immunity in a § 1983 warrantless false arrest case, must a law enforcement officer demonstrate that the existence of actual probable cause, rather than "arguable" probable cause, was necessary for the arrest to have been objectively reasonable?

LIST OF PARTIES

1. The ten Petitioners herein, Defendants-Appellees below, are the City of DeSoto, Texas, Kenneth Hood, Stanley Joe O'Briant, Norman Agee, Dennis Kruse, J. T. Henrise, Earl D. Musser, J. Zihlman, W. Ransom and Boyd Norton.

2. The six Respondents herein, Plaintiffs-Appellants below, are Douglas Morgan, Kerry Curby, Troy Hall, Lisa Blair Bishop, Kathy Kuehler and Jeffrey Scott Escue.

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No. 90-393

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OPINIONS BELOW

The opinion of the District Court is not reported but is reproduced in the Petitioner's appendix pages App. 14 through App. 19. The opinion of the Court of Appeals for the Fifth Circuit is reported at 900 F.2d 811.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

COUNTER-STATEMENT OF THE CASE

This cause arises from several arrests which occurred shortly after 10:00 p.m. on May 3, 1985 on shopping center parking lots in the City of DeSoto, Texas. DeSoto does not have a traditional downtown retail area but rather the majority of its retail businesses are located along Hampton Road in shopping centers surrounded by large parking lots. The arrests in question resulted from the activity of driving automobiles by young persons up and down Hampton Road. This activity was referred to as "cruising" and was most "active" on warm weather Friday and Saturday nights, although some "cruising" apparently occurred on every night. Some business owners and operators complained to DeSoto City Council of litter and isolated acts of vandalism. There is no evidence that any of the Respondents were either guilty of littering or vandalism, nor does the record contain evidence that even a majority or a significant number of the "cruising" young people were either vandals or significantly contributed to the littering.

Responding to the complaints, The DeSoto City Council directed Director of Public Safety, Stanley O'Briant, and its police chief, Kenneth Hood, who in turn directed Lt. Dennis Kruse to formulate a plan and a time for the mass arrest of anyone who was found on any shopping center parking lot. The date and the time of the arrests was left to the discretion of Kruse, but it is apparent that May 3, 1985, was chosen because it was a Friday night and a Friday night would likely result in the greatest impact. All of these arrests were elaborately planned and executed. Virtually the entire DeSoto Police Department was involved as well as members of the Dallas

County Sheriff's Department and other law enforcement agencies. The plan formulated by Kruse required that shortly after 10:00 p.m. for the police in a coordinated manner to surround, overwhelm, and arrest for criminal trespass any person found on any shopping center parking lot. Somewhere between forty-six (46) and fifty-eight (58) individuals were arrested. Since it was predetermined that each arrest would be for criminal trespass, the police reports had been mass produced and prepared in advance except for the name, address, etc. Each report identically described an arrest of an individual for criminal trespass.

The arrestees were placed in jail facilities designed for far fewer individuals than were arrested. Each arrestee, including the Respondents, were herded like cattle through the overwhelmed and overcrowded DeSoto Police Department booking procedures. Each arrestee was taken before a DeSoto City Magistrate who merely advised each arrestee of the reason for the arrest. By plan, no attempt was made by the Magistrate to independently evaluate the probable cause for any arrest or even to set bail. The arrestees were then held in the overcrowded DeSoto jail cells until they were transferred to the larger Dallas County Jail several miles away. None of the arrested persons were allowed access to a telephone for several hours after their arrests and then only after they were transferred and rebooked into the Dallas County Jail. Morgan, Escue, Curby and Hall were not given access to a telephone until about 9:00 a.m. the following morning after their arrests. Respondents Blair Bishop and Kuehler were given phone access approximately four to five hours after their 10:00 p.m. arrest.

While arrests occurred on several parking lots, the Plaintiffs were arrested on two (2) different shopping center parking lots. Their respective arrests occurred simultaneously within seconds or minutes of one another. The setting for arrest of the Respondents is as follows:

The arrest of Respondents Morgan, Hall, Curby and Escue: On May 3, 1985, near 10:00 p.m., Douglas Morgan, in the company of Troy Hall, Kerry Curby drove his pickup truck north on Hampton Road. Morgan, Hall and Curby had jointly agreed to purchase a meal at a drive through fast-food establishment known as the "Jack in the Box". This establishment also had facilities that would allow a patron to eat a meal on site. The "Jack in the Box" outwardly appears to be a part of a large shopping center named the Pleasant Run Village Shopping Center. This shopping center covers an entire city block and extends from Pleasant Run Road on the south to Woodhaven on the north. The "Jack in the Box" is located on the west side of Hampton and southern most part of this shopping center on the corner of Hampton Road and Pleasant Run Road. Morgan approached this location from the south but a raised concrete traffic median between the north and south bound lanes of Hampton Road prevented him from lawfully or physically turning directly left into the "Jack in the Box". Rather MORGAN was required to go to the next intersection, (Hampton Road and Woodhaven Drive) and execute a left turn on Woodhaven Drive and then immediately execute another left turn onto the Pleasant Run Village Shopping Center parking lot. (MORGAN could not lawfully execute a U-turn on Hampton Road because there was a sign indicating that a "U-turn" was legally prohibited.) On the

Pleasant Run Shopping Center parking lot and adjacent and parallel to Hampton Road there was a paved roadway which had been designated with a north and south bound traffic lane. This paved strip led directly to the "Jack in the Box". On this evening, it was MORGAN'S intention to drive to the "Jack in the Box" by using this shopping center roadway as the route to the "Jack in the Box." Until May 3, 1985, this roadway had been universally used and accepted as a route to this eating establishment. There were no fences, enclosures, barricades or signs which indicated that this route was either unacceptable or unlawful. Shortly after MORGAN had turned his vehicle onto this paved strip, DeSoto Police Lieutenant DENNIS KRUSE blocked the Plaintiff's pickup with a DeSoto police cruiser. KRUSE then ordered MORGAN, HALL and CURBY out of MORGAN'S vehicle. KRUSE was shortly thereafter joined by DeSoto officers EARL MUSSER and J.T. HENRISE. MUSSER KRUSE and HENRISE then placed MORGAN, HALL and CURBY under arrest and tied their hands behind their backs and required them to seat themselves on the ground of the parking lot. Very shortly thereafter JEFFREY SCOTT ESCUE was likewise arrested for following MORGAN in his vehicle with the intent to use the same route to go to the same "Jack in the Box" as MORGAN had intended in his vehicle. After a short while, MORGAN, HALL, CURBY, ESCUE and several other similarly arrested individuals were taken by paddy wagon to the DeSoto City jail.

The arrest of Respondents KUEHLER and BLAIR BISHOP; Earlier in the evening of May 3, 1985, KATHY KUEHLER and LISA BLAIR BISHOP had participated in

a girl's softball tournament in the City of DeSoto. Both KUEHLER and BLAIR BISHOP were high school seniors at a Dallas County suburb located in Grand Prairie, Texas. Before this evening, neither had ever been in DeSoto and both were unfamiliar with DeSoto or its purported "cruising" problem. Both of these young women were clothed in their softball uniforms. After the softball tournament, followed by a short meeting, KUEHLER and BLAIR BISHOP, at about 9:30 p.m. and in the company of two other young ladies, left the softball field in BLAIR BISHOP'S automobile to locate a place to eat. They first attempted to eat at a restaurant but because it was too crowded, elected instead to go to a convenience store and purchase snacks and cold drinks. After leaving the convenience store, these young ladies noticed that they were being followed by a group of young men in a pickup truck who were attempting to gain their attention. Plaintiff BLAIR BISHOP pulled her vehicle into the Hampton Square Shopping Center parking lot, located at 719 N. Hampton, to attempt to learn what the young men wanted. The young men in the pickup truck drove into the shopping center nearby the BISHOP vehicle and the Plaintiffs and the young men exchanged greetings and names. Before any further conversation could transpire, DeSoto Police Officer ZIHLMAN in the company of Officer NORTON, and LT. KRUSE and other unidentified DeSoto police officers, blocked BLAIR BISHOP'S vehicle with a DeSoto police cruiser. The officers ordered all the occupants out of BLAIR BISHOP'S vehicle and arrested and handcuffed all of them. Later they were all taken to the DeSoto City Jail.

After these arrests took place as well as several others, each arrestee was prosecuted for criminal trespass. Not all of the persons arrested on the shopping center parking lots stood trial, but all faced trial. The Dallas County District Attorney tried three (3) different groups of young persons, but each trial ended in acquittal. This included the trial of the criminal trespass charges brought against KUEHLER and BLAIR BISHOP. One of other trials involved persons who were arrested under similar circumstances on the same parking lot as MORGAN, HALL, CURBY and ESCUE. After these trials, the District Attorney determined that he could not obtain convictions and on his motion dismissed all of the remaining charges of criminal trespass, including the charges lodged against MORGAN, HALL, CURBY and ESCUE. The apparent reason that the District Attorney could not obtain convictions was because he could not convince any juror in any of the respective trials that the persons arrested on May 3, 1985 for criminal trespass had "notice" as defined by the Texas Penal Code.

Article 30.05 of the Texas Penal Code defines criminal trespass thusly:

§30.05 Criminal Trespass

(a) A person commits an offense if he enters or remains on property or in a building of another without effective consent and he:

(1) had notice that the entry was forbidden; or

(2) received notice to depart but failed to do so.

(b) For purposes of this section:

(1) "entry" means the intrusion of the entire body; and

(2) "notice" means:

(A) Oral or written communication by the owner or someone with apparent authority to act for the owner;

(B) fencing or other enclosure obviously designed to exclude intruders or to contain livestock; or

(C) a sign or signs posted on the property or at the entrance to the building, reasonably likely to come to the attention of intruders, indicating that entry is forbidden.

In the District Court the individual police officers defended by asserting that they had probable cause to arrest and this factor entitled them to "qualified immunity". The Plaintiffs insisted that the "notice" was clearly insufficient and that their arrest and/or prosecutions took place without probable cause.

"Notice" at the Pleasant Run Village Shopping Center affecting MORGAN, HALL, CURBY and ESCUE: On May 3, 1985, there was not a sign indicating "no trespassing" at the entry of the Pleasant Run Village Shopping Center used by Respondents. The nearest sign facing in the direction of travel to the entrance where MORGAN, HALL, CURBY and ESCUE entered the Pleasant Run Village Shopping Center was 182 feet away. This sign was hanging on the bottom of a large sign listing the

businesses in the shopping center; it was 18" x 18" and the letters were 11/16" high. In daylight it wasn't possible to be read from the distance of 182 feet, darkness even further obscured the sign. If a car was parked near this sign, it would block the view of the sign. Another sign was hanging under the eaves of a store measuring 12" x 12" and was 39 feet up the roadway. In daylight this sign was not visible unless one faced it directly by pulling into a parking space. In the dark, it could not be seen because of a glare from the store lights. In order to see the sign by using the same route as MORGAN and ESCUE, it would have required them to stop 39 feet after entering the lot, turn their heads to the right (west). Even if this occurred the lettering on this sign was too small to be legible.

The message on the signs at the Pleasant Run Village Shopping Center was:

> No Trespassing, these premises are for Pleasant Run Shopping Center customers and Tenants only. Entry to the lot by all other persons is prohibited. Violators will be prosecuted under 30.05 of the Texas Penal Code.

Because MORGAN, CURBY, HALL and ESCUE were destined for the "Jack in the Box" they were arguably customers of the Pleasant Run Village Shopping Center because the "Jack in the Box" outwardly appears to be part of this shopping center. There was written agreement among the respective owners of the Jack in the Box property and the Pleasant Run Village Shopping Center that travel between the properties would not be impeded by either party in any way. The property manager of the Pleasant Run Shopping Center testified in two of the

criminal trials that as long as the Respondents were traveling to the "Jack in the Box" they were not in violation of the law or the "no trespassing signs". DeSoto Police Officers Musser, Kruse, Henrise, Ransom, and Smith, agreed that the Pleasant Run Village Shopping Center parking lot could be lawfully used as a "short cut" to the "Jack In the Box" restaurant. DeSoto Officers Henrise and Smith admitted that it does appear that the Pleasant Run Village Shopping Center includes the "Jack In The Box".

"Notice" at the Hampton Square Shopping Center affecting the arrests of BLAIR BISHOP: Signs on this lot measured 12" x 12" and were placed 15-20 feet off the ground. These factors made them illegible and even more so at night. None of the signs were placed at an entrance. The signs read:

> "No trespassing these premises are for Hampton Square Shopping Center Patrons only. Loitering and littering are prohibited by law and violators will be prosecuted under 30.05 of the Texas Penal Code."

All of these signs faced away from Hampton Road toward the center of the five acre parking lot. In order to be in a position to potentially read any of these signs, a person would have to be on the shopping center parking lot, making it necessary to be a "trespasser" before one had notice that a violation of the law was taking place. On May 3, 1985, there were no signs, fences or other devices advising anyone that entry to this shopping center parking lot was forbidden.

REASONS FOR DENYING THE WRIT

I. PETITIONERS HAVE NO STANDING TO RAISE QUALIFIED IMMUNITY AS A DEFENSE.

Petitioners are claiming entitlement to defense of qualified immunity that is not supported by established precedent. Nor are Petitioners requesting the Supreme Court to overrule or reconsider established precedent. Since *Monell v. Dept. of Social Services*, 436 U.S. 658 (1978), and undoubtedly since *Owens v. City of Independence*, 445 U.S. 622 (1980) the right to claim the benefit of what was previously referred to as the "good faith" defense, now the qualified immunity defense is reserved only for individuals acting in their individual capacity and not for municipalities. Therefore the City of DeSoto has no standing to assert the defense and no standing to seek review for claims of qualified immunity by Certiorari. Additionally, on page 5 of their Petition for Certiorari, Petitioners make the following assertion:

> Plaintiffs, Respondents herein, were arrested either at the Pleasant Run Village Shopping Center or the Hampton Square Shopping Center parking lots after 10:00 p.m. on May 3, 1985, by police officers who were acting under color of state law, *in their official capacities as City of DeSoto police officers at the time of the arrests.* (Emphasis supplied)

The above emphasized quote is not contradicted elsewhere in their petition. If one is to believe what is carefully written by petitioners' counsel, then the DeSoto Police are seeking review by Certiorari only for the actions taken by them in their official capacity. If this is the case, then the police have no more standing than the

City of DeSoto because a § 1983 claim against an individual acting in his official capacity is in actuality a claim against his governmental employer. *Brandon v. Holt*, 469 U.S. 464 (1985). If a City cannot claim the benefit of the qualified immunity defense, *Owens v. City of Independence, supra*, then individuals acting in their official capacity cannot either. The rationale in not allowing the defense to local government remains the same regardless of the subsequent alterations in the defense of "immunity" found in the decisions of *Harlow v. Fitzgerald*, 457 U.S. 800 (1982) and *Mitchell v. Forsyth*, 472 U.S. 511 (1985), and their progeny.

> The knowledge that a municipality will be liable for all of its injurious conduct, whether committed in good faith or not, should create an incentive for officials who may harbor doubts about the lawfulness of their intended actions to err on the side of protecting citizens' constitutional rights. Furthermore, the threat that damages might be levied against the city may encourage those in a policy-making position to institute internal rules and programs designed to minimize the likelihood of unintentional infringements on constitutional rights. Such procedures are particularly beneficial in preventing those "systemic" injuries that result not so much from the conduct of any single individual, but from the interactive behavior of several government officials, each of whom may be acting in good faith. *Owen v. Independence* at 445 U.S. at 651.

II. THE COURT OF APPEALS HAS NOT DISREGARDED ANY SUPREME COURT AUTHORITY BUT HAS MERELY CONCLUDED THAT A FACTUAL CONTROVERSY EXISTS ON THE ISSUE OF QUALIFIED IMMUNITY WHICH HAS PRECLUDED SUMMARY JUDGMENT.

The Court of Appeals for the Fifth circuit has fully complied with *Harlow v. Fitzgerald*, 457 U.S. 800 (1982)

and *Anderson v. Creighton*, 483 U.S. 635 (1987) and has disregarded neither. The law governing arrests is clearly established as it is governed by Fourth Amendment principles involving probable cause and reasonableness. In the District Court the DeSoto Police claimed that they had probable cause to arrest the Respondents and effectively took the position that if "no trespassing" signs existed anywhere on the shopping center parking lots regardless of placement, size or message, they would be entitled to immunity from suit. Unfortunately the District Court brought this dubious position but in doing so made no finding that the signs were "reasonably likely to come to the attention of intruders" and ignored that any factual controversy over this issue existed. Now that the Court of Appeals for the Fifth Circuit has reversed the District Court, the police now claim that if they did not have probable cause, they must have had "arguable" probable cause. This position was not squarely presented by them to the Court of Appeals for the Fifth Circuit and for this reason alone their Petition for Certiorari on should be denied.

The statute (Texas Penal Code Art. 30.05) on which the police base their arrest of the Respondents requires that a "no trespassing" sign "be reasonably likely to come to the attention of intruders." The Court of Appeals for the Fifth Circuit concluded that:

> Whether a reasonable officer could have concluded that there was a reasonable likelihood that these signs, or one of them, would come to the attention of an intruder, is a question of fact. We are unable to resolve this question on the summary judgment record before us. Aside from the question of whether, under all of these

> circumstances, the signs would give reasonable notice to anyone driving upon or across the shopping center parking lot that they were excluded from doing so, the visibility of the signs and their messages cannot be determined. 900 F. 2d at 814-815.

Before any Appellate Court can properly consider this matter, factual findings concerning the reasonableness of the decision to arrest based on the reasonableness required by the statute concerning the placement as well as the content of the "no trespassing" signs, is required.

III. THERE IS NO CONFLICT AMONG THE CIRCUITS.

Nothing said or accomplished by the Court of Appeals for the Fifth Circuit in this cause indicates any conflict with either *Vonstein v. Brescher*, 904 F. 2d 572 (11th Cir. 1989) or *Gorra v. Hanson*, 880 F. 2d 95 (8th Cir. 1989) or *Floyd v. Farrell*, 765 F. 2d 1 (1st Cir. 1985). Actually these cases from the 1st, 8th and 11th Circuits turn not on the presence or absence of "arguable" probable cause but on the reasonableness under the respective circumstances of the actions of police in making arrests. In doing so, the First, Eighth, Eleventh Circuits as well as the Fifth Circuit have all applied the constitutional standard of reasonableness found in the Fourth Amendment. Probable Cause as found in the Fourth Amendment is defined in terms of the reasonableness of the actions taken. The Supreme Court has stated that the element of reasonableness inherent in the definition of probable cause "protects by the officer and the citizen". *Henry v. U.S.*, 361 U.S. 98

(1959). The Fourth Amendment itself strikes the appropriate balance between the need for effective law enforcement and the protection of citizens' privacy. This is accomplished by the joint resolution of both the presence "probable cause" and whether police conduct was "unreasonable." All of the circuit court opinions including the Fifth Circuit's opinion in this case applied these identical standards to the matters one respectively placed in front of them. The only thing different was the Fifth circuit concluded that the facts were in controversy and refused to decide the issue of immunity until the facts were resolved. In this matter questions of qualified immunity can only be resolved after the fact finder determines whether or not the signs which the Petitioners claim are adequate "no trespassing signs" meet the statutory standards. If the signs meet the statutory standards, then the police decision to arrest was either or both not "unreasonable" and made with "probable cause". Until these threshold questions concerning the signs are resolved by the fact finder, the Supreme Court should not grant Certiorari.

IV. PETITIONERS ARE MAKING UNREASONABLE CLAIMS OF QUALIFIED IMMUNITY.

The police position regarding their claims of qualified immunity is untenable. If one were to accept the police position that any sign would suffice, then according to Petitioners, it would then be reasonable for an officer to arrest a person in the middle of a ten mile square of unfenced land where there was a business card size "no trespassing sign" posted on a tree one mile away and completely opposite to the place and direction of travel of the supposed trespasser. Of course this is not

what was intended by the Texas Legislature when it enacted Penal Code Art. 30.05 nor should it be contemplated that the Fourth Amendment would sanction such an unreasonable act. The limitations that the Fourth Amendment places on the criminal trespass statute does not allow it to be read as a trap for the citizen who innocently travels across a shopping center parking lot to obtain a meal. Nor should the Fourth Amendment be allowed to use the criminal trespass statute to justify an arrest of a citizen who goes onto a shopping center parking lot in the presence of a small sign twenty feet high facing towards the center of the lot which forbids the citizens' presence on the lot but not his entry.

Here it is likely that the evidence is that none of the signs on either lot were "likely to come to the attention of intruders". The signs at both lots were not visible at the entrances from the adjacent streets, the signs were not lighted, and were either too far away and/or too high to be legible. On one of the lots a citizen is a trespasser even before the citizen is in a position to potentially read a sign. Obviously these signs were purposely placed and worded by the shopping center owners in a manner that intended that they be ignored and unnoticed. This is because if the signs were given their full effect and meaning they would subject everyone but an actual purchaser of merchandise to arrest. This is because the signs claim to allow the presence of only the customer or the patron on the respective properties. This would also mean that at any time of the day, a citizen who intended only to window shop or to browse would be subject to arrest. Additionally the arrest of the mailman, the deliveryman, the garbage man, and repairman would be sanctioned.

This would result in the police having probable cause to arrest anyone, anytime and the only way to avoid arrest would be to be seen in circumstances clearly indicating a purchase. Most assuredly, none of the DeSoto Police believe these signs should be used in this manner and most of them have admitted as much.

CONCLUSION

For the foregoing reasons, the petition for a Writ of Certiorari filed by petitioners City of DeSoto, et al should be denied.

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